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Docket Entries

	Date *1968*	
1.	May 28	—Petition filed together with order to show cause why an order should not be made pursuant to Rule 41 of the Federal Rules of Criminal Procedure directing the return of petitioner's property seized on May 18, 1968.
	May 29	—Hearing on order to show cause before Rosling, J.
2.	June 6	—Affidavit of David P. Steinmann in opposition to motion for order to show cause.
3.	June 12	—Government's memorandum of law filed.
	June 12	—Hearing on motion and order to show cause before Weinstein, J. Decision reserved.
4.	June 28	—Memorandum and order filed by Weinstein, J., granting the motion for suppression and return.
5.	July 29	—Notice of appeal filed.
6.	September 6	—Order filed by Travia, J., that time for docketing of record on appeal is extended from September 7, 1968 to October 17, 1968.
7.	October 12	—Reply affidavit of Salvatore E. Rozzo filed.
8.	October 12	—Petitioner's memorandum of law filed.

Docket Entries

9.	October 12	—Petitioner's reply memorandum filed.
	October 14	—Papers and certified copy of docket entries mailed to clerk of Court of Appeals.
10.	October 16	—Acknowledgment of papers endorsed upon index filed.
	1969	
11.	March 26	—Opinion of Mansfield, D.J., for the Second Circuit.

Order to Show Cause

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In the Matter of the Petition of
THE COLONNADE CATERING CORP.

For the Return of Seized Property and the Suppression of Evidence

Upon the annexed verified petition of The Colonnade Catering Corp., duly verified the ..... day of May, 1968, let the United States Attorney for the Eastern District of New York, Michael J. LaPerch, Jr., Internal Revenue Service Alcohol Tax Unit Area Supervisor, and all persons acting under their direction, supervision and control, show cause at a term of this Court, to be held in Room 10, at the Court House, at Brooklyn, New York, on the 7th day of June, 1968, at 10:00 o'clock in the forenoon on that day, or as soon thereafter as counsel can be heard, why an order should not be made pursuant to Rule 41 of the Federal Rules of Criminal Procedure, directing that all property of which the petitioner is the owner which was seized on May 18, 1968 be returned to the petitioner; that any and all of the aforesaid property any anything obtained as a result of the search of petitioner's premises and seizure of petitioner's property, and any information directly or indirectly obtained therefrom or by means thereof, be suppressed for the use as evidence in any trial, hearing, or proceeding

upon the ground that the said property was illegally seized without a warrant; and, that the United States Attorney for the Eastern District of New York, the said officers, their agents and the agents of the Federal Government, and all other persons acting under their direction, supervision or control, and all other persons, be restrained and enjoined from using any of the seized property and anything obtained as a result of said search and seizure and any information directly or indirectly obtained therefrom or by means thereof in any trial, hearing, or proceeding, and it is further

ORDERED, that pending the hearing and determination of this petition, the United States Attorney, the said officers, and all other persons acting under their direction, supervision or control, and all other persons having possession of any of the aforesaid property or anything obtained as a result of the aforesaid illegal search and seizure or any information directly or indirectly obtained therefrom or by means thereof be restrained and enjoined from delivering or disclosing any of the same to any other person or persons, government or governmental agency.

Let service of a copy of this order and the papers upon which it was granted upon the United States Attorney for the Eastern District of New York, and upon the said Michael J. LaPerch, Jr., on or before the 4th day of June, 1968, be deemed good and sufficient service.

Dated: Brooklyn, New York, May 29th, 1968.

/s/ George Rosling
United States District Judge

Petition

[Same Title]

State of New York)
County of New York) ss.:

The petition of The Colonnade Catering Corp. respectfully shows and alleges:

1. That the petitioner is a domestic corporation duly organized and existing under the Laws of the State of New York, and has its principal place of business at 666 Sunrise Highway, Rockville Centre, New York. The petitioner is engaged in the catering business at its said premises and is licensed by the State of New York to serve alcoholic beverages.

2. That on May 18, 1968, certain property of which petitioner is the owner was unlawfully seized and taken from petitioner by agents of the Internal Revenue Service and a Nassau County policeman, without a search warrant and against petitioner's will.

3. The facts and circumstances surrounding the seizure of petitioner's property were as follows: That on May 18, 1968, at about 4:00 P.M., three Internal Revenue Service special investigators who identified themselves as Raymond Boylan, Oscar London and Louis Kozinn, and a Nassau County Police Department patrolman, who identified himself as J. Gaglio, entered upon petitioner's premises and made a search of the portion of the premises which were open to the public and where alcoholic beverages were at that time being served. Without the consent of petitioner or its agents or employees, they then also searched non-public

portions of the premises, including the basement. Thereafter, they demanded that petitioner's locked storeroom be opened for their inspection. Said storeroom was not in a portion of the premises open to the public and was locked. The said officers were advised that Salvatore E. Rozzo, petitioner's president and managing agent, was not then present on the premises and that he was the only person authorized to open the locked storeroom. Petitioner's said president is informed that petitioner's acting manager, William Greenberg, was told that unless the storeroom was opened, the officers would break the door to enter same and that one of the officers threatened to arrest Mrs. Rosalyn Feder, one of petitioner's employees, as an accomplice if she did not unlock the door. Mr. Greenberg then spoke on the telephone with Michael S. Stern, Esq., one of petitioner's attorneys, who thereupon spoke with one of the officers, who identified himself to Mr. Stern as Raymond Boylan. Mr. Stern asked Mr. Boylan if the officers had told Mr. Greenberg that unless the storeroom was unlocked, they would break down the door to gain access. Mr. Boylan denied that such statement was made.

Sometime thereafter, and prior to 6:00 P.M., the Internal Revenue Service area supervisor, Michael J. LaPerch, Jr., arrived and entered petitioner's premises and at about 6:00 P.M., petitioner's aforesaid president also arrived and had a conversation with the said Michael J. LaPerch, Jr. Mr. LaPerch demanded that petitioner's president, Salvatore E. Rozzo, open the locked storeroom for inspection by the officers. Mr. Rozzo asked if the officers had a search warrant and was told by Mr. LaPerch that they did not, and that they did not need one; that they were entitled to examine the entire premises, public, non-public, locked or unlocked, without a warrant and would break into the locked room if access was not given them.

Shortly after 6:30 P.M. on said day, the said officers forcefully broke into petitioner's locked storeroom and after entering and remaining therein by themselves for approximately thirty minutes, removed numerous sealed and unsealed bottles of liquor. The officers then proceeded to perform what they claimed to be chemical testing of the contents of several bottles of liquor in the petitioner's lobby.

The officers then asked Mr. Rozzo to sign certain receipts, true copies of which are annexed hereto, which the officers stated were receipts for the items which they were removing from petitioner's premises. Mr. Rozzo stated that he had no way of knowing what they had taken from the locked storeroom and that whatever they were taking was being taken without petitioner's consent and against petitioner's will. He, therefore, refused to sign any of the receipts. However, Louis Kozinn, one of the officers, then signed Mr. Rozzo's name on the receipts and left signed copies of same at petitioner's premises.

All of said officers having continuously remained on petitioner's premises since their respective arrivals, at approximately 8:00 P.M., they removed from petitioner's premises the property set forth in the annexed receipts without petitioner's consent and against petitioner's will.

4. That no arrest was made on May 18, 1968 or to date, and upon information and belief, no proceedings of any kind whatever have been commenced against petitioner or any of petitioner's officers, servants, agents or employees.

5. That petitioner is informed that all of the seized property has been delivered to the Internal Revenue Service Chemist in Charge for testing.

6. That the aforesaid search and seizure was illegal and unwarranted, in that it violates the provisions of the Con-

stitution of the United States, and the retention or use of any property seized as alleged evidence infringes upon petitioner's Constitutional rights. Petitioner, therefore, asks for the return of all of said property so seized and the suppression of any evidence obtained as a result of the said illegal search and seizure, if it is intended to be used against petitioner or any of petitioner's officers, directors, agents or employees.

7. That petitioner seeks the relief herein sought by order to show cause in order that the said officers and all other persons be restrained and enjoined from delivering any of the seized property or disclosing any information obtained as a result of the illegal search and seizure to any other person pending the hearing and determination of this petition.

8. That no previous application has been made for the relief sought herein.

WHEREFORE, petitioner respectfully requests the following relief:

A. That all of the aforesaid property unlawfully seized without a search warrant be returned to petitioner.

B. That anything obtained as the result of the aforesaid illegal search and seizure and any information directly or indirectly obtained therefrom or by means thereof be suppressed for use as evidence and excluded in any trial, hearing or other proceeding and that the Court grant an order of suppression accordingly.

C. That pending the hearing and determination of this petition, the United States Attorney, the said Michael J. LaPerch, Jr., and he said officers, their agents and the agents of the Federal Government, and all other persons

acting under their direction, supervision or control, and all other persons having possession of any of the aforesaid property or anything obtained as a result of the aforesaid illegal search and seizure or any information directly or indirectly obtained therefrom or by means thereof be restrained and enjoined from delivering or disclosing any of the same to any other person or persons, government or governmental agency.

Dated: May 28, 1968.

THE COLONNADE CATERING CORP.,
Petitioner

By /s/
SALVATORE E. ROZZO,
President

Petition

State of New York)
County of New York) ss.:

Salvatore E. Rozzo, being duly sworn, deposes and says that he is the president of The Colonnade Catering Corp., the corporation named in the within petition; that he has read the foregoing petition and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

This verification is made by him because The Colonnade Catering Corp. is a domestic corporation. He is an officer thereof, to wit, the president.

The grounds of the undersigned's belief as to all matters not stated upon his knowledge are as follows: Conversations with employees of the petitioner.

/s/
Salvatore E. Rozzo

Sworn to before me this 28th day of May, 1968.

/s/ Jerome M. Stember
Notary Public, State of New York
No. 30-3833850
Qualified in Nassau County
Commission Expires March 30, 1969

Petition

FORM 1689 (REV. JULY 1963)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

REMOVAL AND SUBMISSION OF SAMPLES FOR TESTING

(See instructions on bottom of form)

(1)

ASSISTANT REGIONAL COMMISSIONER (Region) NORTH ATLANTIC

ORIGINATING TRADE NAME, IF ANY THE COLONNADE CATERING CORP.

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE 666 SUNRISE HIGHWAY, ROCKVILLE CENTRE, N.Y.

KIND OF ESTABLISHMENT	REGISTRY NO.	PERMIT NO.	SPECIAL TAX STAMP	CASE NO.	DATE PROCURED OR SEIZED
R.L.D.			473117	45327	5-28-68

Samples drawn from the above premises, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco

Tax Division, are:

ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

CONTAINERS: FROM (Inclusive)	TO (Inclusive)	SIZE	KIND (Whether full, partly full, or empty)	DESCRIPTION OF CONTENTS	PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.)
1612	1	4T	FULL	J & B SCOTCH	TO DETERMINE IF GENUINE
13	2	5T	FULL	J & B SCOTCH	TO DETERMINE IF GENUINE
14	3	5T	FULL	J & B SCOTCH	TO DETERMINE IF GENUINE
15	4	5T	FULL	J & B SCOTCH	" " " "
16	5	5T	FULL	J & B SCOTCH	" " " "
17	6	5T	FULL	J & B SCOTCH	" " " "
18	7	5T	FULL	J & B SCOTCH	" " " "
19	8	5T	FULL	J & B SCOTCH	" " " "
20	9	5T	FULL	J & B SCOTCH	" " " "
21	10	5T	FULL	CHIVAS REGAL	" " " "
22	11	5T	FULL	CHIVAS REGAL	" " " "
23	12	5T	FULL	CHIVAS REGAL	" " " "
24	13	5T	FULL	WHITE & WHITE SCOTCH	" " " "
25	14	5T	FULL	" " " "	" " " "

If distilled spirits (or wines) are found to be as represented on the label, such part of the sample that remains after tests [illegible] indicated below. However, if refund or credit of tax is to be given on the sample,

[illegible] will not be returned

Authority to destroy [illegible] distilled spirits (or wines) are removed with the consent of the undersigned proprietor.

CONTAINERS SEALED IN MY PRESENCE BY (Check type seal or specify)

[illegible] OTHER (Specify)

[illegible]

SIGNATURE OF OFFICER

[illegible]

TITLE SPECIAL INVESTIGATOR

DATE TRANS. TO LABORATORY

BY (Name and title)

INSTRUCTIONS

[illegible] articles, materials, or spirits submitted by proprietors, officers, and in quintuplicate for tax-determined spirits removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), one copy will be sent to the Area Supervisor, one copy, if prepared in quintuplicate, will be sent to the Technical Ruilings and Services Section, and the remaining copy will be retained.

[illegible] articles, materials, or spirits submitted [illegible] The original will be [illegible] copy will accompany the sample(s), [illegible] copies will be attached to the report of inspection or investigation.

FORM 1689 (REV. 7-67)

Petition

FORM 1669 (REV. JULY 1962)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

REMOVAL AND SUBMISSION OF SAMPLES FOR TESTING

(See instructions at bottom of form)

(2)

ASSISTANT REGIONAL COMMISSIONER (Region)
NORTH ATLANTIC

NAME AND TRADE NAME, IF ANY
THE COLONNADE CATERING CORP.

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE
666 SUNRISE HIGHWAY, ROCKVILLE CENTRE NY

KIND OF ESTABLISHMENT	REGISTRY NO.	PERMIT NO.	SPECIAL TAX STAMP	CASE NO.	DATE PROCURED OR MAILED
RD			473217	F-1-1227	8-18-68

There are transmitted herewith, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco Tax, the following:

ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

CONTAINERS				DESCRIPTION OF CONTENTS	PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.)
FORM 1488 NO.	NUMBER	SIZE	PORTION FILLED		
79626	15	ST	FULL	WHITE LABEL SCOTCH	TO DETERMINE IF GENUINE
27	16	4/5	FULL	" " " "	" " " "
28	17	4/5	3/4	" " " "	" " " "
29	18	4/5	3/4	" " " "	" " " "
30	19	ST	FULL	HAIG SCOTCH	" " " "
31	20	ST	1/2	" " "	" " " "
32	21	4/5	FULL	GRANT'S SCOTCH	" " " "
33	22	ST	1/4	BALLANTINES SCOTCH	" " " "
34	23	ST	1/4	100 PIPERS SCOTCH	" " " "
35	24	4/5	FULL	WILD TURKEY	" " " "
36	25	4/5	FULL	" "	" " " "
37	26	4/5	3/4	" "	" " " "
38	27	ST	FULL	HENNESSY COGNAC	" " " "
39	28	4/5	1/2	" " " "	" " " "
40	29	4/5	FULL	" " " "	" " " "
79611	30	4/5	1/2	SEAGRAMS 7 CROWN	" " " "

If unpaid distilled spirits (or wines) are found to be as represented on the label, such part of the sample that remains after tests have been completed will be returned to [illegible]. However, if refund of excise tax is to be given on the sample, the [illegible] will be retained.

Samples:

☒ will ☐ will not be returned

Authority to withdraw samples of tax-paid spirits (or wines) are removed with the consent of the undersigned proprietor.

CONTAINERS SEALED IN MY PRESENCE BY (Check type seal or specify)	SIGNATURE OF OFFICER
☐ WAX ☐ CELLOPHANE ☒ PAPER ☐ OTHER (Specify)	[signature]
SIGNED (Proprietor) [signature]	TITLE SP. INVESTIGATOR
BY (Name and title) [signature] SP. INV.	DATE TRANS. TO LABORATORY / BY (Name and title)

INSTRUCTIONS

[illegible] and check [illegible] Copy will be attached on following:

(1) In duplicate for articles, materials, or spirits. The original will be furnished the proprietor and the copy will be attached to the report of investigation.

(2) In triplicate for articles, materials, or spirits submitted by assigned officers and in quintuplicate for tax-determined spirits removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), and the copy will be attached to the report of investigation.

(3) In quintuplicate for articles, materials, or spirits submitted by assigned officers and in quintuplicate for tax-determined spirits removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), one copy will be sent to the Area Supervisor, one copy, if prepared in quintuplicate, will be sent to the Technical Assistance and Services section, and the remaining copy will be retained.

If [illegible] the [illegible] of [illegible]

[illegible] the premises copy will be attached to the report of inspection or investigation.

FORM 1669

13a

Petition

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

Form 1669 (Rev. July 1962)

REMOVAL AND SUBMISSION OF SAMPLES FOR TESTING

(See instructions at bottom of form)

(7)

ASSISTANT REGIONAL COMMISSIONER (Region)

NORTH ATLANTIC

NAME AND TRADE NAME, IF ANY

THE COLONNADE CATERING CORP.

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE

446 S. NYACK HIGHWAY ROCKVILLE CENTRE N.Y.

KIND OF ESTABLISHMENT	REGISTRY NO.	PERMIT NO.	SPECIAL TAX STAMP	CASE NO.	DATE PROCURED OR MAILED
RLD			473117	C.I. 3897	5-18-68

There are removed from the above premises, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco Tax, the following:

ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

CONTAINERS: Form 5000.24 No.	CONTAINERS: Number	CONTAINERS: Size	CONTAINERS: Condition (Full)	DESCRIPTION OF CONTENTS	PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.)
79642	31	4/5	FULL	SEAGRAMS CROWN ROYAL	TO DETERMINE IF LABELING
43	32	4/5	FULL	" " " "	" " " " " "
44	33	4/5	1/2	SCHENLEY	" " " " " "
45	34	QT	FULL	I.W. HARPER	" " " " " "
46	35	QT	FULL	CANADIAN CLUB	" " " " " "
47	36	4/5	1/2	OLD GRAND-DAD	" " " " " "
48	37	4/5	FULL	JACK DANIELS	" " " " " "
79649	38	4/5	1/2	DEAHDAIR	" " " " " "
79772	A	4/5	FULL	WILD TURKEY	COMPARATIVE SAMPLE
	B	QT	FULL	I.W. HARPER	" " "
	C	4/5	FULL	SEAGRAMS CROWN ROYAL	" " "
	D	1/5	FULL	OLD GRAND-DAD	" " "
	E	QT	FULL	J&B SCOTCH	" " "
79777	F	QT	FULL	HAIG SCOTCH	" " "
79760	G	4/5	FULL	WHITE LABEL	" " "

If tax-paid distilled spirits (or wines) are found to be as represented on the label, such part of the sample that remains after tests are completed will or will not be returned as indicated below. However, if refund or credit of tax is to be given on the sample, it will not be returned.

Samples:

[ ] will [ ] will not be returned

Articles, bottled tax-paid distilled spirits (or wines) are removed with the consent of the undersigned proprietor.

CONTAINERS SEALED IN MY PRESENCE BY (Check type seal or specify)

CELLO-PHANE [ ] PAPER [X] OTHER (Specify) [ ]

SIGNED (Proprietor)

SIGNATURE OF OFFICER

TITLE Special Investigator

BY (Name and title)

DATE TRANS. TO LABORATORY

BY (Name and title)

INSTRUCTIONS

[illegible] the original copy will be attached to the report of investigation or inventory taken.

(3) In quintuplicate for articles, materials, or spirits submitted by assigned officers and in quintuplicate for tax-determined spirits removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), one copy will be sent to the Area Supervisor, one copy, if prepared in quintuplicate, will be sent to the Technical Guidance and Services Section, and the remaining copy will be retained.

[illegible] case of seizure [illegible]

FORM 1669 (REV. 7-63)

Petition

FORM 1669 (REV. JULY 1962)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

REMOVAL AND SUBMISSION OF SAMPLES FOR TESTING

(See instructions at bottom of form)

(4)

ASSISTANT REGIONAL COMMISSIONER (Region)

NEW ATLANTIC

NAME AND TRADE NAME, IF ANY

THE GOLDEN APE CATERING CO.

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE

666 SUNRISE HIGHWAY ROCKVILLE CENTER N.Y.

KIND OF ESTABLISHMENT	REGISTRY NO.	PERMIT NO.	SPECIAL TAX STAMP	CASE NO.	DATE PROCURED OR SEIZED
RLD				L.I. 5211	12-12-67

Samples are removed from the above premises, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco Tax, the following:

ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

FORM 1692 NO.	CONTAINERS NUMBER	CONTAINERS SIZE	CONDITION FULL OR PART	DESCRIPTION OF CONTENTS	PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.)
79761	H	1/5	FULL	GRANTS SCOTCH	TO HAVE AND SAMPLE
79662	H-1	1/5	FULL	BALLANTINES SCOTCH	" " " "
79679	I	1/5	FULL	CHIVAS REGAL	" " " "
	20 J	1/5	FULL	JACK DANIELS	" " " "
	21 K	5T	FULL	CANADIAN CLUB	" " " "
	22 L	5T	FULL	SEAGRAMS 7 C.	" " " "
	23 M	5T	FULL	100 PIPERS	" " " "
79624	N	5T	FULL	NAIG NAIG LINEN	" " " "

If samples distilled spirits for wines' are found to be as represented on the label, such part of the sample that remains after tests have been made shall be returned as indicated below. However, if evidence of lack of [illegible] in the sample, [illegible] shall be retained.

DISPOSAL

[illegible] be returned

A [illegible] of the [illegible] hereby requested [illegible] be removed with the consent of the undersigned proprietor.

CONTAINERS SEALED IN MY PRESENCE BY (Mark & type seal or specify)

[X] TAX CELLOPHANE [ ] PAPER [ ] OTHER (Specify)

SIGNATURE OF OFFICER

[illegible]

SIGNED (Proprietor)

[illegible]

TITLE

SPECIAL AGENT

BY (Name and title)

[illegible]

DATE TRANS. TO LABORATORY

BY (Name and title)

INSTRUCTIONS

[illegible]

FORM 1669

Petition

FORM 1669 (REV. JULY 1962)

U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

REMOVAL AND SUBMISSION OF SAMPLES ~~FOR TESTING~~

(See instructions at bottom of form)

ASSISTANT REGIONAL COMMISSIONER (Regions)

[illegible]

NAME AND TRADE NAME, IF ANY

[illegible] CATERING CORP

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE

[illegible] Rockville Centre, NY

KIND OF ESTABLISHMENT	REGISTRY NO.	PERMIT NO.	SPECIAL TAX STAMP	CASE NO.	DATE PROCURED OR SEIZED
[illegible]			[illegible]	[illegible]	5/16/68

The undersigned requests that the samples listed below, taken from the above premises, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco Tax, be released to:

ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

CONTAINERS				DESCRIPTION OF CONTENTS	PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.)
SAMPLE NOS.	NUMBER	SIZE	PROOF OR WEIGHT		
1	1			PLASTIC FUNNEL	FOR EVIDENCE
2	1			METAL FUNNEL	FOR EVIDENCE

If samples of distilled spirits (or wines) are found to be as represented on the label, such part of the sample that remains after tests [illegible] shall not be returned as indicated below. However, if refund or credit of tax is to be given on the sample, [illegible] shall not be returned.

Original

[illegible] shall not be returned

Authorized removal samples of distilled spirits (or wines) are removed with the consent of the undersigned proprietor.

CONTAINERS SEALED IN MY PRESENCE BY (Check type seal or specify)

GUMMED PAPER ___ OTHER (Specify) ___

ABC Sealed (Signature) [illegible]

SIGNATURE OF OFFICER

[illegible]

TITLE Special Investigator

BY (Name and title) [illegible]

DATE TRANS. TO LABORATORY

BY (Name and title)

INSTRUCTIONS

[illegible] shall be submitted [illegible] Internal Revenue Service. The original will be [illegible] accompany the sample(s). The duplicate copy will be attached to the request of importers or bona fide [illegible] to be packaged or be subject, materials, or spirits submitted by [illegible] officers and to manufacturers of distilled spirits plants, removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), one copy will be sent to the Area Supervisor, one copy, if prepared in quadruplicate, will be sent to the Technical Tastings and Services Section, and the remaining copy will be retained.

FORM 1669 (REV. 7-62)

Affidavit of David P. Steinmann

[Same Title]

State of New York)
County of Kings) ss.:

David P. Steinmann, being duly sworn, deposes and says that he is an Assistant United States Attorney, duly appointed according to law and acting as such.

This affidavit is submitted in opposition to defendant's motion for an Order to Show Cause requiring the suppression and return of certain alcoholic spirits seized by Special Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service.

The facts of this case and the law governing these facts are fully set forth in the Government's Memorandum of Law which is submitted herewith. Upon information and belief and after conversations with the Special Investigators involved in this case, it is submitted that the inspection, examination and seizure here complained of were authorized by statute and were lawful in all respects.

Wherefore, it is respectfully submitted that for the reasons set forth in the aforementioned Memorandum of Law, and such other facts and evidence as may be brought to the attention of the Court at the time of the hearing of this motion, defendant's motion for an Order to Show Cause should be denied.

David P. Steinmann
Asst. United States Attorney

(Sworn to June 6, 1968.)

Reply Affidavit of Salvatore E. Rozzo

[Same Title]

State of New York)
County of New York) ss.:

Salvatore E. Rozzo, being duly sworn, deposes and says:

1. That I am the President and General Manager of The Colonnade Catering Corp., the petitioner herein, and make this affidavit in reply to the affidavit of David P. Steinmann, Assistant United States Attorney and the Government's Memorandum of Law, in opposition to the petitioner's motion herein.

2. It must be noted that the Government has failed to furnish any affidavit setting forth the facts surrounding the search and seizure of petitioner's property, by anyone having personal knowledge thereof. Indeed, the only affidavit submitted by the Government sets forth no facts whatsoever. This affidavit, executed by David P. Steinmann, Assistant United States Attorney, alleges "upon information and belief and after conversations with the Special Investigators involved in this case" that the facts are "fully set forth in the Government's Memorandum of Law". Your deponent has been advised and verily believes that such an affidavit is without any probative value whatsoever. However, since the "facts" as set forth in the Government's hearsay memorandum are argumentative, inaccurate, misleading and untrue in many respects, deponent desires to supplement his previously verified petition in support of this motion with sufficient additional information so that the Court will be in possession of all

the facts and circumstances surrounding this illegal search and seizure.

3. The Government's memorandum of law begins by characterizing the investigation of petitioner's premises as "routine". Based on statements made to petitioner by the Internal Revenue Service Area Supervisor and one of the Special Investigators, petitioner believes that this was more than just a "routine" investigation. However, without laboring this difference, the hearsay statements contained in the Government's memorandum build on inference and implication rather than fact. The memorandum states: "Toward the rear of this area the Investigators observed *what appeared to be* one or more bartenders pouring bottles of whiskey into the sink of a 'floating bar'. The Investigators approached the bar and smelled whiskey in the sink. All of the whiskey bottles visible were empty." [Emphasis added.] Deponent is uncertain as to what the Special Investigators actually claim to have seen. If they actually saw "one or more bartenders pouring bottles of whiskey into the sink of a floating bar", they certainly could have stopped at least one of the bartenders from emptying at least one of the bottles since they were there. However, the fact is that no whiskey was poured into the sink of a floating bar by any bartender at any time. The floating bars, of which there were two being used at the time these Investigators and the Nassau County police officer entered the petitioner's premises, are small carts, approximately two feet by three feet in dimension, on wheels. All liquor being served after 1:30 P.M. on the day in question was served from these rolling or floating bars. Neither of these rolling or floating bars contains a sink. They are nothing more nor less than carts on which bottles of liquor, glasses and buckets of ice are placed with mixers and the like. These rolling bars con-

tained all of the liquor being served at this party from approximately 1:30 that afternoon. Since neither of these rolling bars contains a sink, it was an impossibility for anybody to pour whiskey into the sink of a floating bar.

4. It is noteworthy that, to bolster the aforesaid hearsay claim, the Investigators further claim that they smelled whiskey in the sink. Since these floating bars contain no sinks, this claim is obviously untrue.

5. Prior to 1:30 in the afternoon of the day in question, the party in progress was being served from a permanent bar. At approximately 1:30 P.M. on that day, this bar was "broken down" and liquor and other mixings, etc., were transferred to the aforesaid two rolling bars. Therefore, this permanent bar was not being used for the service of drinks after 1:30 P.M. on that day. Although this permanent bar does contain a sink, this is not the sink referred to in the Government's memorandum. Nor were any bartenders stationed at this bar at the time of the "inspection", both bartenders employed at that time being stationed with their rolling bars in the room itsef. A smell of whiskey by these Investigators behind the permanent bar is of no probative value whatsoever. Deponent has been in proximity to many bars and the smell of alcoholic beverages is constantly observable behind a liquor bar, particularly where dregs of drinks may have been poured down a sink prior to 1:30 P.M. on the day in question and where all the liquor necessary to replenish the rolling bars from time to time was also stored. Also, bottles consumed during the affair on the day in question were returned to the standing bar for inventory control purposes, which would also serve to create an alcoholic aroma.

6. The statement by the Investigators that "all of the whiskey bottles visible were empty" is also unworthy of belief. The affair being conducted in petitioner's premises on the day in question continued until 5:30 P.M. on that afternoon. The Investigators arrived at approximately 4:00 P.M. During the hour and one-half which elapsed between the arrival of the Investigators and the completion of the affair, the rolling bars were being used continuously for the service of alcoholic beverages. No alcoholic beverages whatsoever were brought into the party room at any time after 12:30 P.M. on that day. All liquor required for this party was in the room itself, either behind the permanent bar or on the floating bars. Obviously, then, all of the liquor bottles visible to the Investigators could not have been empty. Indeed, at the conclusion of the affair, all whiskies not consumed during the affair were returned by the bartenders to petitioner's control and were in full view of the Investigators outside the locked liquor storeroom.

7. Petitioner has devoted many words to refuting the contentions made in the Government's memorandum, despite the fact that, as previously stated, petitioner has been advised and truly believes that the hearsay statement of so-called facts set forth in the said Government's memorandum is entitled to no weight whatsoever.

8. An additional factual mis-statement contained in the Government's memorandum is the hearsay allegation that "petitioner's liquor was stored in a small room approximately adjacent to the ballroom" and that petitioner's storeroom "was adjacent and convenient to the ballroom area" where liquor was then being served to patrons. Actually, the locked storeroom in question was and is approximately seventy-five feet from the entrance to the ball-

room and is separated from the ballroom by the kitchen, office and lavatory facilities of petitioner and a corridor. This attempt by the Government to color and distort the true facts by means of hearsay and untrue allegations is an attempt to raise dust and throw same into the eyes of the Court.

9. The hearsay recital of the alleged facts in the Government's memorandum may lead to a conclusion that the storeroom which the Government Agents forcibly broke into was not locked. Although the Government's memorandum does concede that the entry was made without consent and that the storeroom was locked, Investigator LaPerch was compelled to do much more than "push the door to the storeroom open" to gain access. As a matter of fact, the Investigators forcibly broke into the storeroom, actually tearing the door latch from the door frame. Upon the argument of this motion, petitioner will submit a photograph to establish the extent of the force applied.

10. There are other errors and omissions contained in the Government's hearsay allegations, such as their omission of the fact that the three agents and Nassau County policeman on the premises, called Michael J. LaPerch, Jr., the Area Supervisor, after they were refused access to the locked storeroom to come to the premises, as well as the Government's omission of the fact, as disclosed by the Government's receipt annexed to petitioner's moving papers, that two funnels used by petitioner to transfer sacramental wine from commercial containers to altar decanters used for religious wedding ceremonies, were removed from petitioner's premises "for evidence". It is also noteworthy to point out that the Government's receipts, true copies of which are annexed to petitioner's moving papers, provide a place for the signature of the

proprietor of the establishment being "inspected" and consenting to the removal of the property set forth thereon. Said receipts were not signed by petitioner and were signed by the Government's Special Investigator who made them out. No consent to this illegal entry was ever given by petitioner or anyone on its behalf.

11. Without any factual affidavit, and based on inference, conjecture and surmise, the Government has colored the actual facts of this illegal forcible search and seizure of petitioner's property in many respects. The locked storeroom was, contrary to the Government's assertion, not part of the public area or close or adjacent to it; it was approximately seventy-five feet from the entrance to the ballroom. The storeroom was never open during the time of the party on petitioner's premises until the Government Investigators forcibly broke the lock against the express disapproval by petitioner. No evidence was "disposed of by apparently pouring it down the drain". As a matter of fact, nowhere does the Government state unequivocally that the Investigators in fact actually saw any of petitioner's employees pouring whiskey down any sink. This is understandable for, in fact, no such acts were performed.

12. As will be more fully set forth in petitioner's reply memorandum of law, even if the Investigators had seen such acts, their failure to obtain a search warrant and their forcible entry into petitioner's locked storeroom requires that all property removed by them be returned to petitioner, together with the other relief prayed for in the petition. The Government states in its memorandum that "The only alternative to the course followed by the Investigators here would have been to maintain surveillance inside the premises to insure against the destruction of any refilled bottles until sometime the following Monday when an Assistant United States Attorney and a United States Commissioner could be contacted and a search warrant

obtained." Upon information and belief, this statement is wholly untrue. Your deponent is advised and verily believes that an Asistant United States Attorney and a United States Commissioner are on call at all times for the purpose of obtaining both search warrants and arrest warrants during the weekend as well as during the week. It was not "well into the evening on a Saturday when the inspection took place" as claimed by the Government. The Inspectors arrived at 4:00 P.M. and there was little doubt that there was time to obtain a search warrant after their arrival. However, petitioner is advised by counsel and verily believes that the agents should have had a search warrant in their possession at the time of their arrival at petitioner's place of business under the provisions of the cases cited in petitioner's memorandum and reply memorandum of law. That the agents did not obtain a search warrant prior to their forcible entry into the locked storeroom without petitioner's consent and, indeed, against petitioner's vehement and specific disapproval, violates petitioner's Constitutional rights and the search and seizure are therefore invalid.

WHEREFORE, petitioner respectfully requests the relief requested in the petition herein, togther with such other and further relief as may be just and proper in the premises.

/s/
SALVATORE E. ROZZO

Sworn to before me this 11th day of June, 1968.

MICHAEL S. STERN
Notary Public, State of New York
No. 60-3839185
Qualified in Westchester County
Commission Expires March 30, 1969

Transcript of Hearing Before Weinstein, J.

United States Courthouse
Brooklyn, New York
June 12, 1968

Before:

JACK B. WEINSTEIN, U. S. D. J.

Appearances:

JEROME M. STEMBER, ESQ., Attorney for Petitioner.
JOSEPH P. HOEY, ESQ., United States Attorney, By: DAVID STEINMANN, ESQ., Assistant United States Attorney.

WINFRED D. LEWIS, Official Court Reporter.

Mr. Stember: Your Honor, my name is Jerome M. Stember. I appear for the Petitioner, Colonnade Catering Corporation.

Petitioner is a catering establishment and is a licensee under the laws of the State of New York to dispense alcoholic beverages, and is also subject to the tax of the Federal Alcoholic Beverage Control.

The essential facts are actually set forth in our petition, your Honor. The record, frankly, has been cluttered, I believe, with much non-essential information, primarily because I felt that the Government had by means of heresay imputations in its memorandum, not with an affidavit, introduced prejudicial material which had only one purpose, and that was to prejudice the petitioner in the eyes of the Court.

And I thought that it was essential that if the record be read that the true facts actually be set forth in affidavit form, and we have done so.

I believe that the essential facts that are important here are that on a Saturday afternoon at approximately 4:00 p.m., May 18th to be exact, Plaintiff's place was visited by four Internal Revenue Special Investigators, including an area supervisor, who arrived at the premises later, incidentally, in response to a call from one of the three original ones.

Also present and with these investigators was a Nassau County Patrolman.

They identified themselves and went into the ballroom, where a party was at that time in progress and alcoholic beverages were being served.

They inspected the bar, the rolling bars which were being used at that time. Your Honor, a rolling bar, for your information, is nothing more nor less than a serving cart, it's a tea cart on which bottles, a bucket of ice, some soda, some mixings are contained. It contains no sink.

I have a picture of a rolling bar—it's a very bad picture taken with a Pollaroid at the place, if your Honor would have any interest in seeing it whatsoever.

They thereupon, these investigators thereupon insisted upon examining the rest of the premises, and against the will of the banquet manager, who was the employee of the corporation in charge at that time, searched the cellar and basement of the premises. They thereupon asked that the liquor storeroom or any storeroom which contains liquor be opened to them.

It was explained to them at that time that the liquor store was locked, that the key was not on the premises, that the only person who had authority to enter the storeroom was the general manager, who was not then there.

They threatened to break the door down, or so I have been told.

Access to the liquor storeroom was denied to them by the employees on the premises. However, they were told that the president and general manager of the corporation would arrive shortly.

Upon his arrival they made demands and threats, insisting upon getting into the liquor storeroom, requiring him to open it. He refused, after talking with counsel, incidentally.

After his refusal, sometime after his refusal, one of the special investigators, to be exact the area supervisor, broke the door down. They broke the lock, your Honor. They didn't, as the Government at one point says in its brief, just push the door open.

The Government also admits that the door was locked and was closed. Mr. LaPerch, the area supervisor, broke the door down, as I say in one of the affidavits, or as Mr. Rosso says in his affidavit, we have a picture which we can show to your Honor indicating the broken lock.

The breaking down of this door and the entry into the storeroom was not only without consent of the owner-proprietor, but against his vehement protests, against protests of counsel.

A storeroom is not in a public area of the premises, although, again, in its memorandum the Government indicates that it is convenient to and adjacent to the ballroom. It is approximately seventy-five feet from the entrance to the ballroom, and probably a lot more from the interior, because the entrance is the closest point to the storeroom. It is separated by a kitchen, a large lobby, lavatory facilities, office facilities and the like from the ballroom.

Thus the essential facts of the situation are that Governmental agencies without a warrant, against the protest, against the will and without the consent, broke into the storeroom and removed certain property.

Frankly, I think those are the only essential facts under SEE and Camara that need be considered, although, as I said, we go at length into them, all the facts.

Based on SEE and Camara, on Frisch in the Fifth Circuit, on Hughes against Johnson in the Ninth and on U. S. against Pizzarello in the Second, I believe that this was an unreasonable search, one proscribed by the Fourth Amendment.

The Court: Is there any criminal prosecution pending against—

Mr. Stember: Not at this time, your Honor. We have been advised that dependent upon the result of chemical checks there will be criminal prosecution. The statute provides for criminal penalties.

I would like to say one more thing in that connection: The investigation has been characterized as a routine investigation by the Government. As set forth by Mr. Rosso in his affidavit, he was advised by one of the investigators—and I believe it was Mr. LaPerch—that this was more than routine investigation, they were investigating something specific. I don't know what.

My arguments to the Court are addressed to the point that this is a routine investigation. If it is a criminal investigation I believe that there is no question whatsoever under other cases and SEE and Camera that the search is unreasonable, illegally, invalid, the property taken must be suppressed and returned or destroyed.

Under SEE and Camera, however, I believe, as I am sure your Honor knows, that in its review of the inspection procedures which had been approved for approximately 150 years prior to Camara and SEE, the Supreme Court has severely limited an inspection without a warrant and without consent.

As the Court says in both SEE and Camara, the reasoning in Camara applicable to residences is applicable to

businesses. The reasoning in both cases then comes to this: Under an inspection statute of whatever nature—and the inspection statutes in both cases, Camara and SEE, were very similar in their phraseology to the inspection statute in the ———— case—under an inspection statute of whatever nature where consent is not given get warrant before you make an inspection.

In Camara, because it is a residence, doubt is expressed as to whether or not it is necessary that access to the premises be first be refused before a warrant is obtainable. In Camara as in SEE they explain that a warrant will be more easily obtainable under an inspection statute and is the case under a criminal investigation or under any other type of inspection or search.

In SEE they took that caveat contained in Camara and said to these Governmental agents, if they had known about SEE, "If you suspect that you are going to find something at a place that you are going to inspect, and if you believe that consent may be denied to you once you go there without a warrant, and you don't want anything to happen to whatever it is that you think you may find if consent is refused and you must leave and you must then get your warrant and come back and find it gone, in such a case you get your warrant in advance of your inspection." And that is contained in SEE.

The Court: How many bottles were taken?

Mr. Stember: I can't answer that, your Honor. Thirty-odd?

Mr. Rosso: Fifty.

Mr. Steinmann: There were over fifty bottles taken, your Honor.

The Court: Well, the practice generally, as I understand it, in this Court is to hear motions to suppress at the time of the trial in the criminal case. Now, if there is—what is this, an indictment? Are you going to proceed by indictment if you proceed?

Mr. Steinmann: If there is to be a prosecution here, your Honor, which I think is indicated, then it would be by—

The Court: When are you going to finish your chemical analysis?

Mr. Steinmann: I have been informed that most of the analyses has been finished.

The Court: And does it indicate a violation?

Mr. Steinmann: It does, your Honor, a substantial number of the bottles were refilled.

Mr. Stember: Your Honor—

The Court: Well, I think the practice—am I correct that the practice has generally been to refer these to the trial Court?

Mr. Steinmann: That is the practice, your Honor. Motion to suppress are referred to the Court for decision at time of trial.

Mr. Stember: If your Honor please, I think the law is clear on the right of petitioner to bring this motion prior to indictment,

The Court: Oh, yes, you have that right.

Mr. Stember: And also for a reasonable reason—I'm sorry for a proper reason and an understandable one: Should the motion to suppress be denied prior to indictment, petitioner has a right to appeal it. Should the motion to suppress be denied subsequent to indictment and even before trial, petitioner does not have the right to appeal. It is not a final determination and is then confined to appealing the decision on the motion to suppress in combination with any appeal that may be filed as to the result of the trial.

I think that to force petitioner to await an indictment, to await a trial, would be very unfair to petitioner.

The Court: Is this the only evidence you have?

Mr. Steinmann: Your Honor, the bottles that were taken from the catering establishment are the evidence.

The Court: If this was suppressed you would be able to go ahead, I take it?

Mr. Steinmann: Well, if your Honor suppressed this evidence then our decision would be that we had no basis to prosecute.

Mr. Stember: I am advised by the special investigators that whether the motion—or I have been advised that whether the motion to suppress is granted or not, they are going ahead with their investigation, which I believe will require books and records, audits and things of that nature in connection with the alcohol tax.

The Court: All right. Well, let me hear from the Government now.

Mr. Stember: Surely.

Mr. Steinmann: Your Honor, I think that Mr. Stember has correctly stated the fact that there really are only a few facts that are important here, and they are that several of these agents entered the premises during business hours, that they requested permission to examine the contents of a locked storeroom; the permission was denied, and after some discussion they did enter the room forcibly and removed some of the contents.

Understandably Mr. Stember's characterization of the extraneous facts was prejudicial, and I think that I will leave it to your Honor to read the Government's statement in our memorandum, because I think it is a more accurate statement of what actually happened.

It is our position that it doesn't matter whether the storeroom was locked or open, that the only issue here is whether or not in the absence of consent Government agents acting under the authority of the statute that congress passed giving them the right to inspect—

The Court: Well, you concede there was no warrant?

Mr. Steinmann: There was no warrant.

The Court: You concede that it was locked?

Mr. Steinmann: The door was locked.

The Court: And that permission was refused, and they broke in and took the items?

Mr. Steinmann: That's correct.

The Court: Do you want a hearing on anything further?

Mr. Stember: No, your Honor, if those are the facts that are being considered I don't see any necessity for a hearing.

The Court: You will go on without a further hearing?

Mr. Stember: Yes, your Honor.

The Court: All right, go ahead.

Mr. Steinmann: It's the Government's position, your Honor, that it is irrelevant whether that door was locked or not. I think that Mr. Stember is right again when he says that the cases that are important here, or the case that is important, is SEE. Frisch and Hughes and the other cases that he cited are distinguishable, I think, and I can distinguish them for your Honor if your Honor wishes, but I don't think that they are particularly applicable.

The question is whether or not SEE governs this situation. In SEE there was a locked commercial warehouse. The agents or the fire inspectors there asked to be admitted to inspect for fire violations, and the permission was refused.

The situation is entirely different here. This is an establishment that was open, there was a Bar Mitzvah in progress, people were being served alcoholic beverages. These were business hours.

The Court: Your agents weren't related to the families involved, were they? They hadn't been invited?

Mr. Steinmann: Not this particular weekend, your Honor. Although, I might add, just as background, since Mr. Stember has implied otherwise, that the way this inspection came about was that one of these very agents was

at a Bar Mitzvah there the weekend before, and he saw what looked to him to have been refilled bottles, and so he went and he put in a routine complaint, which was being acted on this following Saturday.

Mr. Stember: Did he drink any of the liquor, sir?

Mr. Steinmann: I think he did. In any event, in SEE it was a closed warehouse, it was off somewhere, there was nothing going on on the premises, it was locked.

In this case the establishment was open, there was a Bar Mitzvah in progress, the agents had to—

The Court: It's not like a restaurant, is it?

Mr. Steinmann: It's a catering—

The Court: I know, but the public isn't invited to enter?

Mr. Steinmann: Well, I think the people who were there were the public. I think the statute specifies that the agents have the authority to enter these kinds of establishments during business hours for the purpose of inspecting for violations of the alcohol laws.

The Court: Well, do you concede that this was a Bar and grill?

Mr. Stember: No, your Honor, this is a catering establishment.

The Court: No, I say if it were a bar and grill what is the law, as you understand it?

Mr. Stember: Well, I—

The Court: I want to understand what the case is about.

Mr. Stember: I distinguish between the public areas of a bar and grill, although SEE apparently may be cited as authority for the fact that if consent is refused to go into the public areas of a bar and grill, the agent needs a warrant.

However, that's not important to my case, because we gave them consent to examine the public areas.

The Court: Oh, you did?

Mr. Stember: Yes, your Honor. They went into the ballroom. Our managers were there. Our banquet manager was there in the ballroom.

The Court: I see.

Mr. Stember: We had no brief with their examination of the ballroom. The liquor was there, they could have examined it, we permitted them to.

May I—just one more thing, and then I will sit down: Camara says that the fact that you have let them into the public areas doesn't necessarily give them the right to get into the private areas.

Mr. Steinmann: Your Honor, I'd answer that by saying that the petitioner isn't claiming that the agents had no right to enter at all. And I don't think petitioner is claiming that had there been a lack of consent the agents wouldn't have had the right to examine the public areas.

Mr. Stember: I said that that is not important to my client's case and therefore I am not arguing the point.

Mr. Steinmann: Well, I suggest that it is important, your Honor, and I suggest that the issue on which this case turns is whether or not the fact that the storeroom was locked makes this a SEE case rather than some other kind of case, and the Government position is that it doesn't.

If this place was open, if they were serving liquor, if it was during business hours, then the agents here had the authority to go in and examine for violations of the law.

Now, it's true that the door was locked and the door was forced, but as I said, that just isn't the point.

The Court: Well, do you think I ought to decide this now?

Mr. Steinmann: I'd frankly prefer your Honor to think about it.

The Court: Well, I don't mean off the Bench. No, I mean before a possible indictment is handed down.

Mr. Steinmann: I would suggest not, your Honor. There are a lot of steps that take place between the seizure of liquor and whatever indictment might come down. I think that probably the proper procedure would be to await

either the return of an indictment of the lack of that return.

The Court: What about this point, is that right, that they can appeal from an adverse decision before an indictment, and not after?

Mr. Steinmann: That's not correct to my knowledge, your Honor.

The Court: I just don't know.

Mr. Stember: I make that representation to your Honor. I investigated that and it is the law in this Circuit.

Mr. Steinmann: Your Honor, if I may perhaps I can get at something that underlies the whole issue, and that is simply that if petitioner is found to have refilled these bottles that information will be communicated to the State Liquor Authority, and on the basis of that it is almost guaranteed that petitioner will lose its license.

The Court: Well, not if it is illegally obtained evidence. There is a question about whether the State can proceed on illegally-obtained evidence.

Mr. Steinmann: Well, of course—

The Court: I am not concerned with it anyway.

Mr. Steinmann: I think that the motion here is premature.

The Court: All right.

Mr. Stember: Your Honor, I would like to emphasize that I think that this motion is not premature. I would like to emphasize that untold hardship can result if this evidence in fact is illegally taken evidence.

The Court: Yes.

Mr. Stember: If it is evidence.

The Court: Well, an indictment against a going business can be hard. Let me consider the briefs, check on this appeals point, would you please, and let me know.

Mr. Steinmann: I will.

The Court: All right, the decision is reserved.

Mr. Stember: If there is anything to the contrary, would you let me know, as well as—

The Court: Yes, communicate to me, with a copy of the letter to defendant.

Mr. Stember: Because I did have it researched prior to bringing this proceedings, your Honor, and found clearly that the law was as I said it was.

The Court: All right, decision reserved.

Mr. Stember: Oh, your Honor, may I ask one more thing: That the Government undertake on the hearing on the show cause order to see to it that nothing further is done with the evidence whatsoever pending decision on the motion.

The Court: No, they can go ahead with their chemical analysis.

Mr. Stember: Right, but the point is—I have no objection to going ahead with the chemical analysis, but I do object to an attempt to communicate any of the facts to anybody that may see them until such time as your Honor's decision may come down and the reasonable time thereafter.

The Court: That's reasonable, I think. Don't you?

Mr. Steinmann: Your Honor, there is no indictment, although this would be an information, your Honor, incidentally—it's a misdemeanor.

The Court: Oh, would it be an information?

Mr. Steinmann: I have no information pending, and I can assure your Honor that I won't file one until this motion is decided. But—

The Court: All right, but you can continue with your examinations.

Mr. Steinmann: That's correct.

Your Honor, I don't know what the procedure is at the Internal Revenue Service with regard to notifying other agencies that might be interested in this. They may well send a letter off to the State Liquor Authority based on the chemical analysis. I just don't know what they will do.

The Court: Well, they have analyzed it already?

Mr. Steinmann: It has been analyzed already.

Mr. Stember: If your Honor please, this was one of the very points that I believe was covered when the Government undertook on behalf of the Internal Revenue Service as well as itself to see to it that nothing further was done to the prejudice of Colonnade.

The Court: Did you enter into a stipulation?

Mr. Stember: I beg your pardon?

The Court: Did you enter into—

Mr. Stember: This was in open Court, your Honor.

Mr. Steinmann: Your Honor, this was in open Court before Judge Rosling. He asked me to assure that nothing would be done until your Honor had heard the motion, and I assured him that would be the case. Now, your Honor has heard the motion.

Mr. Stember: I am asking them to discontinue until such time as your decision will come down and a reasonable time thereafter.

The Court: All right, I will continue that stay of Judge Rosling's.

Mr. Steinmann: It was not a stay, your Honor. He specifically struck a stay provision from the petitioner's order. He asked me informally.

But your Honor, petitioner is asking for a stay that would include having the Government prevent it from writing a letter. I think that's rather a drastic action.

Mr. Stember: Concerning the evidence which is before the Court, the question which is before the Court at this time, your Honor. I don't think that's drastic at all.

Mr. Steinmann: These are routine communications, your Honor. If the evidence is not to be used in a State proceeding, then I think if the State proceeding were to arise that would be the time to determine that, not on an oral petition for a stay as part of an application for a motion that the Government feels is premature.

Mr. Stember: Your Honor, the stay provision in the petitioner's papers was struck because of the Government's

undertaking as the U. S. Attorney stated. To partially decrease the weight of that I think is very prejudicial. The Government did not oppose the issuance of the stay, your Honor, when the application was made.

The Court: Well, I am not concerned with that problem.

Mr. Steinmann: We certainly did.

The Court: As I said a moment ago, I don't want any communication made of the results of the chemical analysis until I have decided the motion or you make a motion before me to permit the Government to reveal this information.

You may continue your analysis and whatever other part of the investigation you want to continue, but if I am going to grant the motion I am not going to allow the delay to prejudice the defendant. I don't want to feel under pressure myself to decide it promptly if it requires a good deal of consideration that I think it does.

Mr. Steinmann: Well, I would suggest that in that case the issue isn't properly before your Honor. There is no application on paper for a stay such as this.

The Court: Doesn't have to be.

Mr. Steinmann: Were your Honor to suppress the evidence, I would suggest that that wouldn't prevent the Federal Government from transmitting the information that it had to the State Liquor Authority anyway.

The Court: No, I could suppress and require you to destroy all materials and not to use it as part of the suppression order, but I don't want you to make any communications until I have decided it, or if you find you want to make a communication you may move before me and I will reconsider it.

Mr. Stember: On notice, your Honor? Motion on notice?

The Court: Oh, yes, not ex parte, on notice.

Decision reserved.

(Whereupon, at this time, the motion was concluded.)

Memorandum and Order of Weinstein, J.

[Same Title]

Appearances:

Jerome M. Stember, Esq., 350 5th Avenue, New York, New York 10001, Attorney for Petitioner

Joseph P. Hoey, United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201

David P. Steinmann, Assistant U.S. Attorney, Of Counsel

Weinstein, D.J.

Petitioner instituted this proceeding pursuant to Rule 41 of the Federal Rules of Criminal Procedure seeking the return of certain property and suppressing its use as evidence in any subsequent trial, hearing or proceeding. Because "the property was illegally seized without a warrant" (Rule 41(e)(1)) the motion must be granted.

The facts are undisputed. The petitioner, Colonnade Catering Corp., conducts a catering business and has a New York State liquor license. While a party was in progress, three Internal Revenue Service special investigators accompanied by a Nassau County policeman arrived at petitioner's premises at approximately 4:00 P.M. on May 18, 1968. (One of the Internal Revenue investigators, while a guest at petitioner's premises the previous week, had noted possible violations of the excise tax law.) They had no search warrant.

After looking around the ballroom (a search which led to no seizures and the legality of which is not in issue here), the investigators demanded that the petitioner's locked liquor storeroom—located approximately seventy-five feet from the entrance to the ballroom—be opened for

their inspection. Petitioner's president, the only person authorized to unlock the storeroom, refused. The investigators, who had been joined by the Internal Revenue Service area supervisor, forcibly broke into the storeroom and removed fifty-three bottles of liquor. No arrest was made then or since.

The government has thus conceded that there was no search warrant, no arrest and no consent to the search. Nevertheless, the government maintains that the search—and seizure incident thereto—were lawful because the premises were public and subject to inspection. We do not agree.

Except "in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court,* 387 U.S. 523, 528-29, 87 S. Ct. 1727, 1731 (1967). This case falls within none of these classes of exceptions.

The government argues that because the petitioner's premises were open to the public, the petitioner is not entitled to the protection afforded by the Fourth Amendment against a warrantless search. Objects not exposed for public view are fully protected against a warrantless search. In *Katz* v. *United States,* 389 U.S. 347 (1967), the Supreme Court rejected having the resolution of search and seizure problems turn on "whether or not a given 'area', viewed in the abstract, is 'constitutionally protected.'" "For," the Court declared, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351-52, 88 S. Ct. at 511 ("person in a telephone booth may rely upon the protec-

tion of the Fourth Amendment."). See also *Mancusi* v. *DeForte,* —— U.S. ——, ——, slip sheet p. 4 (1968) ("the Court's recent decision in *Katz* . . . makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."). *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), which approved a search of file cabinets, involved, unlike the case before us, a valid search warrant.

We need not decide whether a catering establishment which serves invited guests is properly characterized as "public." Under the *Katz* test, petitioner's locked storeroom, to which only the president had the key, must certainly be regarded as an area which petitioner sought "to preserve as private." It is entitled to constitutional protection. See also *United States* v. *Frisch,* 140 F. 2d 660 (5th Cir. 1944) (officers inspecting bar not entitled to break into upper floor where liquor stored); *cf. Wattenberg* v. *United States,* 389 F. 2d 853, 857-59 (9th Cir. 1968) (question of whether search of "open field" adjacent to one's house protected by the Fourth Amendment; Court found that under *Katz* test, the search was illegal because it constituted "an intrusion upon what the resident seeks to preserve as private").

The government contends that its agents were engaged in a routine examination and inspection of the premises, and, consequently, were not required to obtain a search warrant before proceeding. There is no question but that numerous sections of the Internal Revenue Code authorize inspections. See, *e.g.,* 26 U.S.C. §§7606(a), 5146(b). These sections do not authorize warrantless inspections in the absence of consent. In *Camara* v. *Municipal Court,* 387 U.S. 530, 87 S. Ct. 1727 (1967), which arose from a warrantless search of a private resident by city housing

investigators, the Supreme Court rejected the contention that the public interest requires that administrative searches be made without a warrant. While conceding that many desirable governmental policies require periodic inspection for their implementation, the Court nevertheless found that administrative searches "authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." 387 U.S. at 534.

A companion case, *See* v. *City of Seattle,* 387 U.S. 541, 87 S. Ct. 1737 (1967), extended the reasoning of the *Camara* case to a warrantless inspection of a locked commercial warehouse. The Court saw "no justification for . . . relaxing Fourth Amendment safeguards" "merely because commercial rather than residential premises were the object of the police intrusions." 387 U.S. at 543. As it noted,

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant. Ibid.

Any doubt that an individual fully protected as to Fourth Amendment rights, even in a situation where the government has a right to inspect, was dispelled by the Supreme Court in its recent decision in *Mancusi* v. *DeForte,* —— U.S. ——, —— S. Ct. —— (1968). In a footnote, the Court pointed out (slip sheet p. 8, n. 11):

> The Court's opinion in Davis v. United States, 328 U.S. 582, does contain dicta to the effect that there

is a lesser right to privacy when government officials have a "right" to inspect the seized items. See, e.g., id., at 593. However, the only holding in Davis was that there had been a valid consent to the search; the case "did not involve a search warrant issue." See v. City of Seattle, 387 U.S. 541, n. 7.

The government has not made any showing justifying its failure to obtain a search warrant. As the Supreme Court pointed out in the *Camara* case: "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." (387 U.S. at 539, 87 S. Ct. at 1736).

The motion of the Colonnade Catering Corp. for the return of the property seized by the government is granted. Anything obtained as a result of the search is suppressed.

So ordered.

Dated: Brooklyn, New York, June 28, 1968.

U.S.D.J.

Opinion of Mansfield, D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 310—September Term, 1968.

(Argued February 12, 1969 Decided March 26, 1969.)

Docket No. 32817

In the Matter of the Petition of

THE COLONNADE CATERING CORP.,

Plaintiff-Appellee,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellant.

Before:

ANDERSON and FEINBERG, *Circuit Judges,*
and MANSFIELD, *District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York, Weinstein, J., granting appellee, The Colonnade Catering Corp.'s petition for the suppression and return of certain of its property seized by agents of the Internal Revenue Service. Reversed and remanded.

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* Of the Southern District of New York, sitting by designation.

Opinion of District Judge Walter R. Mansfield

JEROME M. STEMBER, New York, N.Y., *for Appellee.*

CHARLES RUFF, Attorney, Department of Justice, Washington, D.C. (Joseph P. Hoey, United States Attorney, David P. Steinmann, Assistant United States Attorney, Eastern District of New York, and Richard L. Mays, Attorney, Department of Justice, Washington, D.C., on the brief), *for Appellant.*

MANSFIELD, *District Judge:*

This appeal is taken by the Government pursuant to 18 U.S.C. §3731 from an order of the district court granting the petition of appellee Colonnade Catering Corporation ("Colonnade") for the suppression and return of 53 bottles containing alcoholic spirits and two funnels seized by agents of the Internal Revenue Service. We conclude that the search and seizure of the property was reasonable and accordingly reverse the decision below.

On the afternoon of Saturday, May 18, 1968, three Special Investigators of the Internal Revenue Service, accompanied by a Nassau County policeman, entered Colonnade's premises at approximately 4:00 P.M. Colonnade, which holds a New York State liquor license, operates a catering establishment, and at the time there was a party in progress in its ballroom where liquor was being served. The purpose of their visit was to determine whether Colonnade possessed any liquor bottles that had been refilled or altered, which would constitute a violation of both federal tax laws, 26 U.S.C. §5301(c) and New York's Alcohol Beverage Control Law, McKinney's Consol. Laws, 3-B,

§107-a and Rule 4 of the State Liquor Authority.[1] One of the agents had attended a party there on the previous Saturday and had observed what he thought were resealed bottles of liquor.

After looking around the ballroom with the manager's consent, the agents inspected the basement of the building without result and stated that they wished to enter a locked liquor storeroom located about 75 feet from the entrance to the ballroom. They were informed that Colonnade's president was the only person with authority to unlock the door; he was called to the scene but refused to do so. Instead he asked the agents if they possessed a warrant and, upon being told by the area supervisor of the Alcohol Tax Unit (who had meanwhile arrived) that according to statute they did not need one, he refused to unlock the door, whereupon the agents broke the lock, entered, and seized the liquor and funnels which are the subject of this petition.

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1. The federal statute provides in pertinent part that:

"*Refilling of liquor bottles.*—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person shall—

"(1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or

"(2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or

"(3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or

"(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of the provisions of paragraph (3); * * *."

Upon Colonnade's motion to suppress the evidence pursuant to Rule 41(e), F. R. Cr. P.,[2] the district court held that the warrantless search and seizure was in derogation of the right of Colonnade and its officers "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure." U.S. Const. Amend. 4. In his opinion Judge Weinstein concluded that the Supreme Court's recent decision in *Camara* v. *Municipal Court, of City and County of San Francisco,* 387 U.S. 523, 530, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) and *See* v. *City of Seattle,* 387 U.S. 541, 87 S. Ct. 1737 18 L. Ed. 2d 943 (1967), extending Fourth Amendment protection to administrative searches of the type there under attack, including a search of a commercial warehouse, precluded a warrantless search of Colonnade's liquor storeroom. The Government contends that the warrantless search in this case is to be distinguished from those before the Supreme Court there, and that search without a warrant was permissible here because it was authorized by statute, 26 U.S.C. §§5146(b) and 7606(a),[3] and the essential govern-

2. Rule 41(e), F. R. Cr. P., provides in pertinent part that:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. * * * If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial."

3. These sections provide:

26 U. S. C. §5146(b)

"Entry of premises for inspection,—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued

mental purpose to be served would be frustrated if a warrant were required. See *Peeples* v. *United States*, 341 F. 2d 60 (5th Cir.), cert. denied, 380 U.S. 988, 85 S. Ct. 1362, 14 L. Ed. 2d 280 (1965); *United States* v. *Sessions*, 238 F. Supp. 746 (N. D. Ga. 1968) (following *Peeples* after the decisions in *Camara* and *See*); accord: *United States* v. *Duffy*, 282 F. Supp. 777 (S.D.N.Y. 1968) (dictum). Appellant further argues that in any event Colonnade, by engaging in the retail liquor business, impliedly consented to warrantless inspections of its business premises.

[1] The first question to be decided is whether the search here must be barred on the authority of *Camara* and *See*, which dealt with the legality of warrantless administrative searches conducted in aid of municipal code enforcement. In those decisions the Supreme Court concluded that where broad inspection authority is granted by statute to an administrative officer, the warrant procedure with its individualized review is required to assure that reasonable limits will be imposed upon the exercise of such authority in each instance and to protect the occupant against excessive intrusion upon his privacy, since he cannot be expected to know the lawful limits of the inspector's power. Furthermore, since the need to search in some cases might be questionable, a particular search might be unreasonable. However, the Supreme Court limited its decision to "administrative searches of the kind at issue here," *Camara*, *supra*, 387 U.S. at 534, 87 S. Ct. at 1733 (i.e., those conducted pursuant to broad grants of authority). Justice

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pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises."

26 U. S. C. §7606(a)

"*Entry during day.*—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects."

White, speaking for the majority in both cases, further observed that warrantless searches are permitted in "certain carefully defined classes of cases," and stated that the question of whether to require a warrant must depend "in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara, supra* at 533, 87 S. Ct. at 1733. With respect to a search of business premises, such as that involved here, the Court went further:

> "We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." *See, supra,* 387 U.S. at 545-546, 87 S. Ct. at 1740.

Thus the door was left open to warrantless administrative searches in those special situations where protection against excessive intrusions upon the individual's privacy could be reasonably assured and the objectives demanded by the public interest would be frustrated if the inspectors were required to obtain warrants. We believe that for several reasons the limited search of a liquor licensee's storeroom by Internal Revenue Service agents falls within the limited exception contemplated by the Supreme Court. In the first place, the statutory grants authorizing the administrative searches in *Camara* and *See,* unlike those here, were extremely broad in scope. For instance, §503 of the San Francisco City Housing Code, which was the ordinance under consideration in *Camara,* gave city inspectors the power to enter "any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." This included the duty (among others) of determining through periodic inspec-

tion whether conditions existed in "residential buildings, dwelling units and neighborhoods" that might be found to be "dangerous, substandard, insanitary or obsolete and deficient," San Francisco Housing Code §101; Part III, §86, San Francisco Municipal Code. In *See*, which involved an attempted inspection of a locked commercial warehouse, the authority was only slightly more restricted. The relevant statute provided for entry by the Fire Chief into buildings other than dwellings "as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards," Seattle Fire Code §8.01.050, 387 U.S. at 541, 87 S. Ct. at 1738. These expansive grants of authority would permit an inspector, unless a warrant was required, to roam at will through any portion of a dwelling house, in one case, or of commercial property, in the other, without the occupant or owner being able to determine the need for the inspection, its purpose and its lawful limits. Theoretically the inspection might seek to uncover any one or more of innumerable possible violations, such as faulty wiring, plumbing, foundations, beams, or the like. Without the safeguard of the warrant machinery, the inspectors could conduct a "general search" of the very type prescribed by the Fourth Amendment. As Justice White noted, "such broad statutory safeguards are no substitute for individualized review," 387 U.S. at 533, 87 S. Ct. at 1733.

[2] In contrast to such broad delegation of inspection authority, the statutory grants of inspection power here under review are carefully defined and narrowed to the point where they grant little, if any, more authority than that which would be extended in a warrant issued by a magistrate after review. The sole authority granted is permission, during business hours, to enter the premises of a dealer in liquor who is subject to a special federal

alcohol tax, 26 U.S.C. §5121(a),[4] for the limited purpose (not involved here) of inspecting those "records or other documents required to be kept by such dealer under this chapter" and the further limited purpose of inspecting "any distilled spirits, wines or beers kept by such dealer on such premises," 26 U.S.C. §5146(b), or to enter "any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects," 26 U.S.C. §7606(a). The agent in the field is not, by virtue of these statutory provisions, given authority to conduct a general search of the premises; he is limited to the place where the liquor is kept and to inspection of specific objects, i.e., the alcoholic beverages. The scope of permissible intrusion without a warrant is thus carefully restricted and it does not entitle the agent to dispense with a warrant before searching the dwelling place of the owner of a retail liquor establishment, *United States* v. *Frisch*, 140 F. 2d 660 (5th Cir. 1944), or clothing belonging to such a person, *cf. Finn's Liquor Shop Inc.* v. *State Liquor Authority*, 31 A.D. 2d 15, 294 N.Y.S. 2d 592 (1st Dept. 1968).

The limited search permitted to be made by an alcohol tax inspector is also distinguishable in another significant respect from the searches reviewed in *Camara* and *See*. As was pointed out by Justice White, broad statutory authorizations of the type there under consideration pose the danger that in a confrontation with an administrative inspector claiming statutory authority to enter and inspect for possible housing or fire code violations, the homeowner or businessman may have "no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under

4. This section provides that:

"*Retail dealers in liquor.*—Every retail dealer in liquor shall pay a special tax of $54 a year. * * *"

proper authorization." 387 U.S. at 532, 87 S. Ct. at 1732. Such a risk, in the type of inspection involved here, is minimal. Dealers in liquor, unlike homeowners or businessmen conducting less specialized activities, are engaged in a heavily regulated business.[5] They are usually well aware of the regulations to which they are subject, and are undoubtedly familiar with the nature and limits of the inspector's authority. Cf. *Zap* v. *United States*, 328 U.S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477 (1946). In fact it is their very knowledge of the possibility of such inspections that make the inspection program an effective means of enforcing the tax law. Such sophisticated licensees, when faced with an inspector whose authority to search is carefully restricted and circumscribed by regulations known to all, are undoubtedly acquainted with the limits upon the agent's inspection rights.

5. All states which permit the retail sale of liquor by private persons license this activity. A 1960 survey showed that, including the District of Columbia, 33 states had such licensing programs for sales at retail for consumption off the premises, while 17 operated under the state monopoly system. H. Levin, *Economic and Regulatory Aspects of Liquor Licensing*, 112 U. Pa. L. Rev. 785, Table 1 at 786 (1964) [Derived from Joint Committee of the States to Study Alcoholic Beverage Laws, *Alcoholic Beverage Control* (rev. ed. 1960)]. No state permits the sale of alcoholic beverages for consumption on the premises without a license. The mass of state and federal legislation regulating this industry is collected and annoted in *CCH Liquor Control Law Rep.* (9 vols.).

The regulatory laws of many states, including those of New York, to which Colonnade is subject, provide for warrantless inspections of the type authorized by the federal statutes here. E.g., 3 McKinney's Consol. Laws of New York Ann. §106(15); 35 Alaska Compiled Laws Ann. §35-4-15(6); Ark. Statutes, Ch. 48, §48-203(d); 30 Conn. Gen. Statutes Ann. §30-6; Fla. Statutes, Ch. 562, §562.031, F.S.A.; 43 Ill. Ann. Statutes §112 subd. 2; Kansas Statutes Ann. Ch. 41, §41-209 (5); 26 La. Rev. Statutes §378; 2B Ann. Code of Md. §190; Ann. Laws of Mass. Ch. 138, §24; Rev. Statutes of Neb. Ch. 53, §53-117; 33 N. J. Statutes Ann. §33:1-23; 37 Okl. Statutes §514(9); 47 Penn. Statutes Ann. §2-209; 7 Vt. Statutes Ann. §564.

[3] For the foregoing reasons the imposition of a requirement that alcohol tax inspectors obtain warrants before carrying out the specifically defined inspection authorized by statute would serve no useful purpose in protecting the Fourth Amendment rights of the liquor dealer. Those rights are already protected by the restrictions contained in the statute itself. We are not dealing here with "area" or "general" searches of the type authorized by municipal codes, and there is no need to utilize the warrant machinery as a means of establishing standards for protection against unwarranted intrusions possible under such codes. Here the area eligible for inspection is clearly and narrowly defined; the purpose is relevant; the scope is limited; and all of these aspects are well known to the operator of the premises being inspected. Nothing of consequence therefore would be achieved through individualized review by a magistrate. In the proper exercise of his discretion, the magistrate would be compelled to issue a warrant as a matter of course, duplicating the limited authority already granted by statute. In short, the statute here under consideration is the equivalent of a warrant.

There remains the question of whether the public interest in alcohol tax inspections would be hindered or prejudiced in any way by warrant procedure, even if all that it involved were the automatic issuance of "rubber stamp" warrants. The public interest in such periodic inspections is hardly open to question. It derives from the potentially great loss to the national revenue which would result from ineffective enforcement of the alcohol tax law. In the fiscal year 1966, for instance, over $3 billion was collected in excise taxes on distilled spirits. The Annual Report of the Commissioner of Internal Revenue (1967), p. 117. A common method of evading such taxes by retailers who sell liquor by the drink is the illegal refilling of bottles in violation of 26 U. S. C. §5301(c). The goal of the inspection is

to deter such violations. An important factor in achieving that goal is the element of surprise. As experience and efforts to enforce the Eighteenth Amendment so frequently revealed in the 1920's, the liquor dealer-violator who receives an advance tipoff of an imminent inspection destroys the evidence before the agent arrives on the scene. Although the dealer knows that he may be visited by inspectors, the effective implementation of the law depends upon his being kept in the dark as to the precise time of the visit. If, as the Supreme Court indicated in *Camara,* "warrants should normally be sought only after entry is refused," 387 U.S. at 539, 87 S. Ct. at 1736, the cat would be let out of the bag in most instances where a violation was being committed and the essential governmental purpose would be frustrated. Warned of the inspection the dealer would quickly destroy or otherwise dispose of the contents of the illegally filled bottles before the inspector returned with his warrant. In this respect the result would differ radically from that presented in municipal code enforcement of the type at issue in *Camara* and *See,* where a delay attendant upon obtaining a warrant might be helpful in achievement of the public interest goals, since the violator might be induced to eliminate the hazard before the inspector's return. Here the effect will be to enable the dealer to escape payment of taxes constituting an essential part of the revenue; and it may be expected that if such a dealer could escape detection, he would repeat the violations with impunity.

We further conclude that an inspection of the type here under review may be lawfully conducted without a warrant for the reason that the retail liquor dealer, upon obtaining his state license and his federal occupational stamp, enters this highly regulated business with a full awareness and expectation that his liquor supply, including that located in "places of storage," 26 U. S. C. §5146(b), will be inspected by representatives of the Treasury Department.

Whether his conduct in entering the business upon such a condition be labelled an implied consent to such an inspection, cf. *Zap.* v. *United States,* 328 U. S.624, 66 S. Ct. 1277 (1946), or a limited dedication to public inspection of that portion of his premises in which his liquor supply is stored, it is clear that he anticipates that such an inspection will be made and he is well aware of the need for such inspection. The situation is substantially the same as if the dealer had knowingly entered into a contract waiving his right to privacy in those areas where he keeps and sells alcoholic beverages. Such a waiver with respect to subject matter in which the public has a special interest would be enforceable, *Zap* v. *United States,* 328 U. S. 624, 66 S. Ct. 1277 (1946); see *Shapiro* v. *United States,* 335 U. S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948), and is to be distinguished from unrelated waivers, cf. *Garrity* v. *New Jersey,* 385 U. S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 5621 (1966); *Spevack* v. *Klein,* 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967), which have been nullified on the ground that such conditions would constitute an unreasonable forfeiture of the citizen's constitutional rights. It does not strike us as unreasonable to require that a liquor dealer, as a condition to entry into a business in which the Government has such a direct and special interest, submits himself to statutory authority to the extent of permitting warrantless inspection of alcoholic beverages on his business premises. In the face of such extensive regulatory measures, the dealer can hardly contend with any degree of conviction that he has a "reasonable expectation of freedom from governmental intrusion" into his bar and liquor storage space, *Mancusi* v. *DeForte,* 392 U. S. 364, 84 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968); *Katz* v. *United States,* 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In this respect his status differs sharply from that of the homeowner in *Camara* or the operator of a commercial warehouse in *See,* neither of whom could have been

expected to have familiarity with the city inspectors' inspection powers under the broad municipal codes there involved. In contrast, the liquor dealer is well aware of the limits of the alcohol tax inspector's authority. To require him to execute an express advance agreement authorizing periodic inspections without warrant would be a superfluous gesture in view of their general awareness of the likelihood of periodic surprise inspections. His situation is comparable to that of the traveler who anticipates a border search of his baggage upon entry into the United States, 19 U. S. C. §§1467, 1496, 1582, a coal mine operator who expects to be inspected by the Secretary of Interior, 30 U. S. C. §§451-454, or an air carrier which is aware of the prospect that its lands, buildings and equipment will be inspected by the C. A. B., 49 U. S. C. §1377. The constitutionality of statutes authorizing such limited warrantless searches in the public interest is generally recognized, *Landau* v. *United States Attorney for the Southern District of New York*, 82 F. 2d 285 (2d Cir. 1936), and the additional imposition of warrant procedure would not serve any useful purpose.[6]

6. Many other federal statutory provisions permit warrantless inspections. E.g., 42 U. S. C. §2051 (inspection of places where research in atomic energy is performed by A. E. C.); 46 U. S. C. §408 (inspection of vessel boiler plates at manufacturer's plant by Coast Guard); 21 U S. C. §§603, *et seq.* (inspection of meat and meat products by Secretary of Agriculture); 42 U. S. C. §262 (inspection of establishments engaged in the preparation of certain kinds of drugs by the Public Health Service); 15 U. S. C. §1270 (inspection of any factory or warehouse in which "hazardous substances" are manufactured, processed, packed, or held for introduction into commerce and of any vehicle being used to transport or hold such substances by the Secretary of Health, Education and Welfare); 21 U. S. C. §157 (inspection of any establishment engaged in the production of certain types of drugs for the treatment of animals by the Secretary of Agriculture); 21 U. S. C. §374 (inspection of any establishment where food, drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into commerce by the Secretary of Health Education and Welfare).

Having concluded for the foregoing reasons that the search of Colonnade's liquor storeroom conducted by the representatives of the Internal Revenue Service pursuant to 26 U.S.C. §§5146(b) and 7606(a) was not rendered unreasonable by the fact that it was conducted without a warrant, we turn to Colonnade's contention that the decision below should be affirmed on the ground that the search was unreasonable.

[4, 5] Colonnade contends that two factors in this case compel affirmance. First, it is argued that the fact of the agents' forcible entry into the liquor storeroom rendered the search "per se" unlawful. However, a search reasonably conducted pursuant to a search warrant is not rendered unreasonable by the use of force in its execution, if the prerequisite of announcement of authority and purpose is fulfilled, 18 U. S. C. §3109; the same standard applies to arrests without a warrant, *Sabbath* v. *United States,* 391 U. S. 585, 88 S. Ct. 1755, 20 L. Ed. 2d 828 (1968), and we see no rational basis for applying a different standard of conduct to warrantless searches. In short, where it is reasonable to conduct a search without a warrant, it is accordingly reasonable to use whatever minimal force is necessary to carry out the search, provided, as is the case here, that the authority of the agent to make the search and the purpose of the entry is announced, and consent to entry is not forthcoming. There would be no point in holding warrantless searches by alcohol tax inspectors to be reasonable if the owner of the premises could render them unreasonable by withholding his consent and compelling the agent to use the minimum amount of force necessary to accomplish his objective.

Second, it is strenuously urged by Colonnade that the search here was unreasonable because the Internal Revenue Service had some basis for believing that evidence of a violation of 26 U. S. C. §5301(c) could be found on the

premises. Thus, it argues, although a routine "administrative" search might be reasonable, the existence of some ground for the search renders it a search pursuant to a "criminal investigation" for which a warrant should be required.[7] In point of fact, of course, any inspection or search conducted by an agent for possible alcohol tax violations could be characterized as a search pursuant to a criminal investigation. Whether or not he has cause to believe that evidence of any such violations will be found, the purpose of the inspection will be to determine, by testing the contents of liquor bottles, whether the business is being conducted lawfully or unlawfully.

[6] Acceptance of defendant's contentions would place the agent in the position of being authorized to conduct a warrantless search only when he had no reason to suspect a possible violation. If, as *Camara* suggests, the withholding of consent forms a basis for a reasonable belief that evidence of a violation can be found, see p. 203 *supra*, a warrant would be required whenever consent was not given, and the public interest in reasonable warrantless searches would be frustrated. We conclude, therefore, that warrantless searches pursuant to the limited statutory authority of 26 U. S. C. §§5146(b) and 7606(a) for the purpose of investigating possible violations of 26 U. S. C. §5301(c) are reasonable within the meaning of the Fourth Amendment, whether or not there is a reasonable basis for believing that evidence of such violations may be found on the premises searched.

Accordingly, the decision of the lower court is reversed and the case remanded to the district court for the purpose of entering an order denying the petition of Colonnade for the suppression and return of property.

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7. Violation of 26 U. S. C. §5301(c) is punishable by a fine of not more than $1,000, or imprisonment for not more than one year, or both. 26 U. S. C. §5606.

Supreme Court of the United States

No. 108 ---- , *October Term, 19* 69

The Colonnade Catering Corp.,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed October 13 ----- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.